

1 RODERICK E. WALSTON
Pro hac vice (Cal. Bar No. 32675)
2 MILES B. H. KRIEGER
Pro hac vice (Cal. Bar No. 309797)
3 BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
4 Walnut Creek, CA 94596
Telephone: (925) 977-3304
5 roderick.walston@bbklaw.com
miles.krieger@bbklaw.com
6

JERRY M. SNYDER
7 (Nev. Bar No. 6830)
LAW OFFICE OF JERRY M. SNYDER
8 429 W. Plumb Lane
Reno, NV 89509
9 Tel.: (775) 449-5647

10 Attorneys for Defendants LYON COUNTY and
CENTENNIAL LIVESTOCK

11 *[Additional Counsel on Next Page]*
12

13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 UNITED STATES OF AMERICA,
16 Plaintiff,

17 WALKER RIVER PAIUTE TRIBE,
18 Plaintiff-Intervenor,

19 v.

20 WALKER RIVER IRRIGATION DISTRICT,
21 a corporation, et al.,
22 Defendants.

Case No. 3:73-cv-00127-MMD-WGC

**ANSWER OF DEFENDANTS LYON
COUNTY, MONO COUNTY AND
CENTENNIAL LIVESTOCK TO
AMENDED COUNTERCLAIM OF
UNITED STATES OF AMERICA**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ADDITIONAL COUNSEL

STACEY SIMON, County Counsel
Pro hac vice (Cal. Bar No. 203987)
COUNTY OF MONO
P.O. Box 415
Mammoth Lakes, CA 93546
Telephone: (760) 924-1700
ssimon@mono.co.gov

Attorney for Defendant MONO COUNTY

This is the Answer of counter-defendants Lyon County, Nevada; Mono County, California; and Centennial Livestock (collectively “Defendants”) to the Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe filed herein on May 3, 2019 (“Amended Counterclaim”). This Answer is made pursuant to the Stipulated Scheduling Order and Discovery Plan dated March 7, 2019 (ECF No. 2437), which only permits answers and affirmative defenses, and prohibits counterclaims. Additionally, the Scheduling Order prohibits parties from responding to allegations contained in the United States’ First Amended Counterclaim (ECF No. 59) at pages 13-31, Paragraphs 20-73.

The Defendants answer the United States’ Amended Counterclaim as follows:

INTRODUCTION

1. Paragraph 1 of the Amended Counterclaim consists of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations.

JURISDICTION

2. The allegations contained in Paragraph 2 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations.

PARTIES

3. Based on information and belief, the Defendants admit the allegations contained in Paragraph 3.

4. The Defendants admit that they are claimants to the water of the Walker River, its tributaries, and to groundwater. They deny that all counter-defendants are identified in the Case Management Order dated April 18, 2000 (ECF No. 108). The remaining allegations in Paragraph 4 consist of legal theories and conclusions that do not require a response. Additionally, the Defendants are without sufficient information to admit or deny the remaining allegations of Paragraph 4, and on that basis deny the remaining allegations in the Paragraph.

GENERAL ALLEGATIONS

5. The Defendants admit that the final judgment entered in *United States of America v. Walker River Irrigation District, et al.*, Equity No. C-125 (D. Nev.) on April 14, 1936, as amended on April 24, 1940 (“Decree”), includes a right for the United States of America. The Decree speaks for itself, and no further response is required. Additionally, the remaining allegations in Paragraph 5 consist of legal theories and conclusions to which no response is required. The Defendants deny that the allegations in Paragraph 5 correctly describe those provisions, and on that basis deny the remaining allegations of the Paragraph.

6. The allegations contained in Paragraph 6 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

7. The Defendants admit that the Decree was entered on April 14, 1936 and amended on April 24, 1940. The Decree, as amended, speaks for itself, and no further response is required.

8. The allegations contained in Paragraph 8 consist of legal theories and conclusions that do not require a response. To the extent that a response is required, the Defendants lack sufficient information to admit or deny the allegations, and on that basis deny the allegations in the Paragraph.

FIRST CLAIM FOR RELIEF**Weber Reservoir**

9. The Defendants re-allege and incorporate herein by reference the responses contained in Paragraphs 1 through 8 of their Answer to the Amended Counterclaim as if fully set forth herein.

10. The Defendants lack sufficient information to admit or deny the first three sentences of Paragraph 10, and on that basis deny them. The remaining allegations of Paragraph 10 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the remaining allegations in the Paragraph.

11. The Defendants lack sufficient information to admit or deny the factual allegations contained in Paragraph 11, and on that basis deny the allegations in the Paragraph.

12. The allegations in Paragraph 12 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

SECOND CLAIM FOR RELIEF

Lands Restored and Added to Walker River Reservation

13. The Defendants re-allege and incorporate herein by reference the responses contained in Paragraphs 1 through 12 of their Answer to the Amended Counterclaim as if fully set forth herein.

14. The Defendants lack sufficient information to admit or deny the factual allegations contained in Paragraph 14, and on that basis deny the allegations in the Paragraph. Additionally, the allegations in Paragraph 14 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

15. The allegations in Paragraph 15 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

16. The allegations in Paragraph 16 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

THIRD CLAIM FOR RELIEF

Groundwater for All Lands Within Walker River Reservation

17. The Defendants re-allege and incorporate herein by reference the responses contained in Paragraphs 1 through 16 of their Answer to the Amended Counterclaim as if fully set forth herein.

18. The allegations in Paragraph 18 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

19. The Defendants lack sufficient information to admit or deny the allegations set forth in Paragraph 19, and on that basis deny the allegations in the Paragraph. Additionally, the allegations in Paragraph 19 consist of legal theories and conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

20. The allegations contained in Paragraph 20 consist of legal theories and conclusions that do not require a response. To the extent a response is required, the Defendants deny the allegations in the Paragraph.

AFFIRMATIVE DEFENSES

GENERAL

First Affirmative Defense

(Failure to State a Claim)

The Amended Counterclaim, and each claim therein, fails to state a claim upon which relief may be granted.

Second Affirmative Defense

(Standing)

Under Article III of the United States Constitution, a party does not have standing to maintain its action unless it demonstrates that it has suffered an “injury in fact”—that is, a “concrete and particularized” injury that is “actual or imminent”—that is fairly traceable to the defendant and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The United States has failed to allege or show that it will suffer an injury in fact if its reserved right claim for lands added or restored to the Walker River Indian Reservation is not adjudicated, and thus does not have standing to assert its reserved right claim.

Third Affirmative Defense

(Failure to Mitigate)

Assuming *arguendo* that the United States has suffered an injury in fact and has standing, any such injury could have been mitigated through reasonable or proper steps that the United States declined to take or failed to sufficiently perform.

Fourth Affirmative Defense**(Laches)**

The Amended Counterclaim, and each and every claim therein, is barred by the doctrine of laches.

Fifth Affirmative Defense**(Estoppel)**

The Amended Counterclaim, and each and every claim therein, is barred by the doctrine of estoppel.

Sixth Affirmative Defense**(Waiver)**

Through the Walker River Paiute Tribe's commencement of action and resolution of claims against the United States, the United States' Amended Counterclaim, and each and every claim therein, have been waived and are therefore extinguished.

NATURE, EXISTENCE AND LIMITATIONS OF RESERVED WATER RIGHTS**Seventh Affirmative Defense****(Failure to Demonstrate Necessity)**

A federal reserved water right exists only if "necessary" to fulfill the *primary* purposes—as opposed to the *secondary* purposes—of the federal reserved lands, *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978), and only to the extent necessary to meet the "minimal need" of the federal reservation, "no more." *Cappaert v. United States*, 426 U.S. 200, 141 (1976). The United States has failed to allege or show that the water granted to the United States in the Walker River Decree is insufficient to meet the minimal needs of the lands that have been added or restored to the Walker River Indian Reservation, and that the additional water is "necessary" to fulfill the primary purposes of such added or restored lands. Thus, the United States does not have a reserved right to additional water for the lands that have been added or restored to the Reservation.

Eighth Affirmative Defense**(No Reserved Right for Water Sources Outside Reservation Lands)**

A federal reserved right applies only to water “appurtenant” to the reserved lands. *Cappaert v. United States*, 426 U.S. 200, 138 (1976). Therefore, assuming *arguendo* that the United States has a reserved water right in lands added or restored to the Walker River Indian Reservation, the United States’ reserved right applies only to waters of the Walker River that are appurtenant to such added or restored lands, and not to waters that are not appurtenant to the lands.

Ninth Affirmative Defense**(Reserved Right Only for Uses Contemplated When Lands Added or Restored)**

Assuming *arguendo* that the United States has a reserved water right in lands added or restored to the Walker River Indian Reservation, the use of the reserved water is limited to the use that was impliedly contemplated at the time the lands were added or restored to the Reservation.

Tenth Affirmative Defense**(Reserved Right, if Any, Only for Dry Land Grazing)**

The primary purpose of adding lands to the Walker River Indian Reservation from 1918 to 1972 was for purposes of dry land grazing. Dry land grazing requires no water for irrigation, and only requires sufficient water to water livestock that can be reasonably grazed on such lands. Therefore, the United States does not have a reserved water right for purposes unassociated with dry land grazing, such as irrigation.

FINALITY OF WATER RIGHTS DECREES**Eleventh Affirmative Defense****(Res Judicata)**

The doctrine of res judicata bars the United States from asserting claims for reserved water rights on lands that were added or restored to the Walker River Indian Reservation prior to issuance of the Walker River Decree, because such additional reserved rights could have been adjudicated as part of the Decree. *Nevada v. United States*, 463 U.S. 110, 129-139 (1983).

Twelfth Affirmative Defense

(Principles of Finality and Repose)

The United States' claim for additional reserved water rights on lands added or restored to the Walker River Indian Reservation are barred under "general principles of finality and repose" that apply to water rights decrees, including the Walker River Decree, that provide a comprehensive adjudication of water rights in a river system. *Arizona v. California*, 460 U.S. 605, 619-620 (1983).

Thirteenth Affirmative Defense

(Decree May Not Be Modified to Recognize Additional Reserved Rights)

Although Paragraph XIV of the Walker River Decree provides that this Court has continuing jurisdiction for the purpose of "correcting or modifying" the Decree, the "general principles of finality and repose" that apply to water rights decrees, *Arizona v. California*, 460 U.S. 605, 619 (1983), preclude Paragraph XIV from being construed as authorizing the Court to modify the Decree by recognizing additional reserved water rights for the United States that were not recognized and established in the Decree.

GROUNDWATER

Fourteenth Affirmative Defense

(Reserved Rights Doctrine Not Applicable to Groundwater Underlying Reservation)

The reserved rights doctrine does not apply to groundwater underlying the Walker River Indian Reservation.

Fifteenth Affirmative Defense

(United States Cannot Assert Reserved Right to Groundwater)

The Walker River Decree adjudicated, and was intended to adjudicate, all reserved water rights of the United States in the Walker River and its tributaries, including groundwater. Therefore, the United States does not have a reserved right in groundwater. Cf. *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145 (Nev. 2011).

Sixteenth Affirmative Defense

(Res Judicata Bars United States' Claim to Groundwater)

The United States' claimed reserved right in groundwater could have been, but was not, adjudicated in the Walker River Decree. Therefore, the doctrine of res judicata bars the United States from asserting additional reserved rights in groundwater. *Nevada v. United States*, 463 U.S. 110, 129-130 (1983).

Seventeenth Affirmative Defense

(Principles of Finality and Repose Bar Modifying Decree to Include Groundwater)

Under the "general principles of finality and repose" that apply to water rights decrees, *Arizona v. California*, 460 U.S. 605, 619-620 (1983), the United States is required—in a general adjudication of water rights in a river system, such as the Walker River adjudication—to adjudicate all of its reserved rights claims in the river system, including its claims for both surface water and groundwater, and is not permitted to seek piecemeal adjudication by asserting claims for surface water in the general adjudication and claims for groundwater in a separate, subsequent proceeding. Therefore, the general principles of finality and repose bar the United States from asserting a reserved right claim in groundwater.

Eighteenth Affirmative Defense

(Surface Water Not Inadequate to Satisfy Primary Reservation Purpose)

Assuming *arguendo* that the United States has a reserved right in groundwater for the Walker River Indian Reservation, the reserved right exists only to the extent that the surface waters of the Walker River are inadequate to accomplish the purpose of the Walker River Indian Reservation. The surface waters of the Walker River are adequate to accomplish the purpose of the Walker River Indian Reservation, and thus the United States does not have a reserved right in groundwater.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CA 94596

PRIORITY OF RIGHTS

Nineteenth Affirmative Defense

(Reserved Rights Junior to Prior Non-Federal Rights)

Assuming *arguendo* that the United States has reserved water rights on lands added or restored to the Walker River Indian Reservation subsequent to the Reservation's creation on November 29, 1859, or subsequent to the Walker River Decree, any such reserved rights are junior in priority to water rights of non-federal water users that were recognized under state law prior to the United States' acquisition of such reserved rights. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

Twentieth Affirmative Defense

(Additional Defenses)

The Defendants reserve the right to further amend this Answer as additional affirmative defenses are discovered.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CA 94596

PRAYER FOR RELIEF

WHEREFORE, Defendants Lyon County, Mono County and Centennial Livestock pray for judgment against the United States as follows:

1. That the United States take nothing by reason of the Amended Complaint, and that judgment be rendered in favor of Defendants Lyon County, Mono County and Centennial Livestock;

2. That Defendants Lyon County, Mono County and Centennial Livestock be awarded their costs of suit allowed by law; and

3. For such other and further relief as the Court deems just and proper.

Dated: Thursday, August 01, 2019

By: /s/ Roderick E. Walston
RODERICK E. WALSTON
MILES B. H. KRIEGER
JERRY M. SNYDER

Attorneys for Defendants LYON COUNTY
and CENTENNIAL LIVESTOCK

By: /s/ Stacey Simon
STACEY SIMON

Attorney for Defendant MONO COUNTY

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CA 94596

CERTIFICATE OF INTERESTED PARTIES

Pursuant to LR 7.1-1, I hereby certify that there are no known interested parties other than those participating in the case.

Dated: August 1, 2019

BEST BEST & KRIEGER LLP

By: /s/ Miles B. H. Krieger
MILES B. H. KRIEGER

Attorney for Defendants LYON COUNTY and
CENTENNIAL LIVESTOCK

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CA 94596

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2019, I electronically filed the foregoing with the U.S. District Court for the District of Nevada via the CM/ECF system, which will send notifications of such filing via email to the parties of record. This filing raises significant issues of law or fact, and therefore is subject to postcard notice as provided for in Paragraph 17.c of the Court's Order continuing service by postcard notice (ECF No. 2495). Accordingly, Unrepresented Parties who have opted for postcard notice (ECF No. 2483) have been served via U.S. Mail with written notice containing the requisite information set forth in Paragraph 18 of the Court's Order continuing service by postcard notice.

Dated: August 1, 2019

BEST BEST & KRIEGER LLP

By: /s/ Miles B. H. Krieger

MILES B. H. KRIEGER

Attorney for Defendants LYON COUNTY and
CENTENNIAL LIVESTOCK

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CA 94596